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No. 85-25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN MORGAN,
Petitioner,
vs.
FIRESTONE TIRE & RUBBER COMPANY,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner filed a diversity products liability lawsuit in 1983 in the U. S. District Court for the Southern District of Georgia, Savannah Division. The lawsuit alleged that a defective tire manufactured by a subsidiary of Respondent was the proximate cause of the death of Petitioner's husband. At trial, Petitioner proceeded on the sole theory of strict liability. R. 8, 53, 345. There was a jury verdict in favor of Respondent and a judgment was entered on that jury verdict. R. 372. The Eleventh Circuit Court of Appeals entered a per curiam decision *without opinion* affirming the judgment in the trial court. The Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc.

As in most products liability cases, the trial of the case became a "battle of the experts." The line-up of expert witnesses was as follows:

FOR THE PETITIONER:	Laurence Keltner (T. at 180.) Leonard Skolnick (T. at 547.)
FOR THE RESPONDENT:	James D. Gardner (T. at 354.)
COURT-APPOINTED EXPERT:	Thomas Baker (T. at 479.)

At trial, Petitioner maintained that the tire in question was defective and that said defectiveness resulted in the death of her husband. R. 3. Respondent maintained that the tire was not defective, but failed due to a long history of under-inflation. T. 43-44. Respondent supported its theory of under-inflation with expert testimony to the effect that the loose cords and pressure grooves found in the tire were evidence of under-inflation. T. 411, 485, 527. In anticipation of this defense, Petitioner put on evidence in her case in chief to the effect that the loose cords and pressure grooves found in the tire were the result of run-flat damage following the blowout and not under-inflation.[1] T. 240, 244, 256. Thus, the origin of the loose cords and pressure grooves became an issue at trial.

Respondent's expert, Gardner, and the court-appointed expert, Baker, testified that the loose cords and pressure grooves found in the tire could not have been a result of the blowout and run-flat of the tire. T. 382, 411, 494-495. As a basis for their opinion in this regard, Gardner and Baker each testified that they had conducted numerous tests in which they purposely caused the blowout of tires and then examined the damage resulting therefrom. T. 382, 458, 495. A video and test tire from one such test were offered in illustration of Gardner's testimony. T. 253-254, 383, 385. The videotape recorded an out-of-court experiment in which a truck was purposely run over a foreign object so that the object caused the blowout of one of the tires on the truck. The film then showed the blown tire being run flat for a distance of 1200 feet before the truck came to a stop. The videotape did not in any way depict or portray any injury to person or property other than the tire itself. T. 384-385. The film was three to four minutes in length. T. 383. At no point did Respondent maintain that the video or test tire were intended to be a re-enactment of the accident which was the subject of the trial. T. 382-386. Rather, the video and test tire depicted therein were offered to illustrate Gardner's testimony concerning physical characteristics of blown tires. T. 253-254, 385, 410-411.

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[1] In fact, Petitioner's expert proffered photographs of a tire of unknown origin, size, etc. as "illustrative" evidence of the cause of pressure grooves. T. 252-254. That evidence, going to the same issue upon which Respondent's illustrative evidence was later submitted, was allowed in by the trial court over Respondent's objection regarding lack of similarity and before Respondent presented the video and test tire which Petitioner now challenges. Thus, the use of illustrative evidence by the experts was opened by Petitioner herself in the trial.

Petitioner objected to the admissibility of the video and test tire on the grounds of lack of similarity to the facts in litigation. T. 403. Prior to ruling on the admissibility of the video and test tire, the judge sent the jury out of the courtroom and viewed the video film and heard extensive voir dire examination of all three experts as to the similarities and differences between the test blowout and the blowout on decedent's truck. T. 384-402. Respondent's expert, Gardner, and the court-appointed expert, Baker, both testified that the test blowout and the blowout of the Morgan tire would yield the same physical evidence, or lack thereof, in the tires. It was the opinion of Gardner and Baker that the results of the test blowout would not be affected by variances in the number of cords in the tire, the road conditions present at the blowout, or any other conditions not duplicated in the illustration. T. 384-397, 401-402. Under voir dire by the court, the court-appointed expert said that the video film and test tire would increase the knowledge of the jury in deciding the case. T. 402. On the other hand, Keltner, Petitioner's expert, testified that the experimental blowout would be misleading. T. 397-401.

Thus, there was a dispute between the experts on the evidentiary value of the video and test tire. After studying case law cited to the court by counsel for Petitioner, and after reviewing the film and hearing voir dire examination of the experts, the trial court ruled that the evidence should be admitted. T. 403.

When the jury returned to the courtroom, the court gave contemporaneous cautionary instructions to the jury in which the differences between the illustrative evidence and circumstances of the Morgan blowout were emphasized. T.

404-405. Counsel for Petitioner extensively cross-examined Gardner on the differences between the test evidence and the Morgan blowout in the presence of the jury. T. 460-462. Petitioner also called her own expert in rebuttal to emphasize those differences. T. 539-542. Finally, in its charge to the jury, the court instructed the jurors that they should look to each expert's means of knowledge of the facts to which that expert's testimony related. T. 563.

Petitioner enumerated as error to the Eleventh Circuit Court of Appeals the admission of the video and test tire into evidence. (Petitioner's Brief to the Eleventh Circuit, p. 1). The Circuit Court of Appeals rejected Petitioner's appeal in a per curiam affirmance without opinion. (Brief of Petitioner, Appendix A). The Circuit Court denied Petitioner's petition for rehearing and suggestion for rehearing en banc. (Brief of Petitioner, Appendix B). Petitioner now seeks a writ of certiorari from this Court on the argument that the decision of the Eleventh Circuit conflicts with decisions of other circuits. (Brief of Petitioner, p. 2).

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Are Uniform In Their Guidelines For Determining Admissibility Of Out-Of-Court Experiments.

Petitioner alleges conflict among the circuits on the issue of admissibility of out-of-court experiments and then attempts to bootstrap the case *sub judice* to the alleged conflict among the other circuits. (Brief of Petitioner, p. 7). On the contrary, there is no conflict among the circuits in this regard. The circuits rely upon common principles of admissibility in applying their discretion to the facts of each case on this issue.

All of the circuit courts require some degree of similarity before admitting experiments into evidence. The distinction lies in the degree of similarity required for experiment evidence introduced to illustrate testimony concerning physical principles on the one hand, and for experiment evidence attempting to reconstruct the facts in litigation on the other. *Szeliga vs. General Motors Corporation*, 728 F.2d. 566, 567 (1st Cir., 1984); *Gladhill vs. General Motors Corporation*, 743 F.2d. 1049, 1051 (4th Cir., 1984); *Young vs. Illinois Central Gulf Railroad Company*, 618 F.2d. 332, 338 (5th Cir., 1980); *Nanda vs. Ford Motor Company*, 509 F. 2d. 213, 223 (7th Cir., 1974); *Jackson vs. Fletcher*, 647 F. 2d. 1020, 1027 (10th Cir., 1981). Substantial similarity is required of evidence of prior accidents or out-of-court experiments attempting to re-create the accident in litigation. *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322 (8th Cir. 1985); *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1983). Some similarity amounting to mere relevance is required of out-of-court experiments offered to illustrate testimony of physical principles. *Szeliga v. General Motors Corp.*, 728 F.2d 566 (1st Cir., 1984). These are the principles which the Circuit Courts of Appeal follow in determining admissibility of experimental evidence. Beyond these principles, "each case must be judged under its own particular facts taking into account the specific purposes for which this type of evidence is submitted." *Szeliga vs. General Motors Corporation*, 728 F. 2d. 566, 567 (1st. Cir. 1984) [quoting *Robbins vs. Whelan*, 653 F. 2d. 47, 49-50 (1st Cir.) cert. denied, 454 U.S. 1123, 102 S.Ct. 972, 71 L. Ed. 2d. 110 (1981)].

Petitioner maintains that some circuits follow these principles of admissibility and other circuits reject them. More particularly, Petitioner maintains that the Circuit Courts of Appeal are inconsistent in requiring similarity before admitting experimental evidence and, secondly, that the appellate courts are inconsistent in recognizing a distinction between the degree of similarity required for admission of out-of-court experiments offered to illustrate physical principles and the degree of similarity required for admission of out-of-court experiments offered to re-create the accident in litigation. As hereinafter shown, these contentions of conflict among the Circuits are unsupported.

A. The Appellate Courts Are Consistent As To The Similarity Requirement.

Petitioner attempts to make out an apparent conflict on the requirement of similarity by comparing two cases on the admissibility of video experiments re-creating the facts in litigation,[2] on the one hand, with a case on the admissibility of a video experiment illustrating physical principles on the other hand.[3] (Brief of Petitioner, pp. 7-9). Petitioner correctly notes that *Hale vs. Firestone Tire and Rubber Company*, 756 F.2d. 1322 (8th Cir., 1985), and *Gladhill vs. General Motors Corp.*, 743 F. 2d. 1049 (4th Cir., 1983), held that there must be substantial similarity between the out-of-court experiments offered in those cases and the facts in litigation. The evidence offered in each of these two cases was all either evidence of prior accidents or evidence amounting to reconstruction of the accidents in litigation.

Hale was a products liability action brought against the manufacturer of a tire rim which separated and struck the plaintiff as he attempted to inflate a truck tire. In *Hale* the Eighth Circuit reversed the case on the basis that evidence of two hundred and ten prior truck rim *accidents* had been admitted without a showing that the wheels in those accidents were in substantially the same condition as the wheel in the *Hale* litigation. The Eighth Circuit held that "[e]vidence of prior accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar." *Id.* at 1332. Respondents submit that this ruling is certainly in keeping with the general rules of admissibility requiring substantial similarity for out-of-court experiments re-creating accidents and for evidence of prior accidents.

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[2] *Hale vs. Firestone Tire and Rubber Company*, 756 F. 2d. 1322 (8th Cir. 1985); *Gladhill vs. General Motors Corp.*, 743 F.2d. 1049 (4th Cir. 1983).

[3] *Szeliga vs. General Motors Corp.*, 728 F.2d. 566 (1st Cir., 1984).

Also before the Eighth Circuit in *Hale* was the question of whether a motion picture film depicting a tire rim accident had been improperly admitted into evidence in the trial court. The film depicted a man inflating a tire, an explosive separation of the tire, and a mannequin struck by the exploding parts. The life-like mannequin was hurled into the air by the explosion and "killed." Thus, evidence of a graphically violent staged accident had been admitted into evidence without substantial similarity. The Eighth Circuit found that the "admission of the film graphically depicting a dissimilar explosive accident and its severe consequences" was error. *Id.* at 1333.

Petitioner is also correct that *Gladhill vs. General Motors Corp.*, 743 F. 2d. 1049 (4th. Cir., 1984), required reversal where there was no showing of substantial similarity between the events depicted in a video film and the events in litigation. However, here again the court was "persuaded that this entire test goes well beyond a mere demonstration of a physical principle" and the court went on to side with the plaintiffs who contended "that this test amounted to a reenactment of the accident." *Id.* at 1051.

Thus, *Hale* and *Gladhill* follow the general rule of requiring substantial similarity for evidence of out-of-court experiments re-creating accidents and for evidence of prior accidents. On the other hand, the requirement of similarity is diluted to what amounts to a test of relevancy in cases such as the one *sub judice* where the evidence is offered for purposes of demonstrating physical principles. Petitioner clouds this distinction in her brief by comparing the similarity requirements of *Hale* and *Gladhill* with the relevance requirements in *Szeliga vs. General Motors Corp.*, 728 F. 2d. 566, 567 (1st. Cir., 1984).

Petitioner further seeks to make the circuits seem at odds on requiring similarity by representing *Szeliga* as holding that similarity is not to be considered at all in determining the admissibility of out-of-court experiments. (Brief of Petitioner, p. 9). *Szeliga* does not so hold. The First Circuit clearly held that the films in issue in *Szeliga* were not a recreation or representation of how the accident happened but were offered to illustrate an expert's testimony.[4] The issue in *Szeliga* therefore became whether or not the films were relevant to the case. In affirming the admissibility of the films, the Eighth Circuit noted that the district court had screened the films and conducted extensive voir dire of the experts before admitting the films into evidence. *Id.* at 567. Thus, it is clear the trial court determined that the films addressed the issues in litigation and were therefore relevant. *Id.* at 567.

Petitioner misrepresents *Szeliga* by taking one sentence in the opinion out of context. That sentence is as follows: "[d]issimilarities between experimental and actual conditions affect the weight of the evidence, not its admissibility." *Id.* at 567. (Brief of Petitioner, p. 9). Read in context of the opinion, this sentence does not say that similarity is not an issue affecting admissibility, but says that once some similarity of conditions is shown, dissimilarities of other conditions will affect the weight of the evidence and not its admissibility. *Id.*

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[4] Incidentally, the facts of *Szeliga* and the nature of the films in issue in that case surprisingly parallel the facts and video film in the case *sub judice*.

In searching for a conflict among circuits, Petitioner ignores the distinction between illustrative evidence and accident reconstruction evidence and incorrectly represents the "illustrative evidence" cases as saying that similarity has no bearing on admissibility.

B. The Appellate Courts Consistently Recognize The Distinction Between Accident Reconstruction Evidence And Illustrative Evidence In Applying Admissibility Requirements.

In a closely-related but distinct argument, Petitioner maintains that some Circuit Courts of Appeal do not recognize a distinction between the similarity requirements for accident reconstruction evidence and the similarity requirements for admitting illustrative evidence. (Brief of Petitioner, p. 11-12). This contention is totally unsupported by the case law. All Circuit Courts that have passed on the issue recognize the distinction. *Szeliga v. General Motors Corp*, 728 F.2d 566, 567 (1st Cir., 1984); *Gladhill v. General Motors Corp*, 743 F.2d 1049, 1051 (4th Cir., 1984); *Young v. Illinois Central Gulf RR Co.*, 618 F.2d 332, 338 (5th Cir., 1980); *Nanda v. Ford Motor Company*, 509 F.2d 213, 223 (7th Cir., 1974); *Ramseyer v. General Motors Corporation*, 417 F.2d 859, 864 (8th Cir., 1969); *Jackson v. Fletcher*, 647 F.2d 1020, 1027 (10th Cir., 1981).

Petitioner cites two cases as refusing to follow the generally accepted dichotomy between illustrative evidence and evidence re-creating the facts in litigation: *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir., 1983), and *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322 (8th Cir., 1985). (Brief of Petitioner, p. 12). Petitioner's representation of these cases as rejecting the dichotomy is completely inconsistent with the opinions themselves.

In *Gladhill*, the plaintiffs appealed contending that a video film put into evidence at trial by the defendant amounted to a re-enactment of the accident without being substantially similar to the accident. The defendants argued that the video did not portray a re-enactment but rather demonstrated physical principles underlying their expert's testimony. *Id.* at 1051. Thus, the issue on appeal was not whether the dichotomy existed but was whether the evidence introduced at trial was merely illustrative or amounted to a re-enactment of the accident. The Fourth Circuit Court of Appeal clearly recognized the dichotomy when it held as follows: "[d]efendants are correct that demonstrations of experiments used to illustrate the principles used in forming an expert opinion are not always required to adhere strictly to the circumstances of the events at issue in the trial. *Brandt v. French*, 638 F.2d 209, 212 (10th Cir., 1981)." *Id.* at 1051.[5] The Gladhill court went on to rule against the defendants on the basis that the video evidence in that case went "well beyond a mere demonstration of a physical principle." *Id.* at 1051. The *Gladhill* decision was made on the basis that the evidence in issue was better categorized as a re-enactment than as illustrative evidence and not on the basis that there is no distinction in similarity requirements for the two. *Id.* at 1051-1052.

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[5] The case relied on by the Fourth Circuit in *Gladhill* in recognizing the distinction in similarity requirements for reconstruction evidence and illustrative evidence, *Brandt v. French*, 638 F.2d 209 (10th Cir., 1981), clearly recognizes the distinction when it says that "demonstrations of experiments used to merely illustrate the principles in forming an expert opinion do not require strict adherence to the facts." *Id.* at 212.

Nor does *Hale* refuse to recognize the dichotomy as argued by Petitioner. (Brief of Petitioner, pp. 11-12). As discussed in detail above, *Hale* involved the admission of "compelling" evidence of numerous other *accidents*, some of them involving fatalities, and a film "graphically depicting a dissimilar explosive accident." *Id.* at 1332, 1333 (Emphasis supplied). In ruling that the prior accidents and film of the simulated accident were improperly admitted, the Eighth Circuit was in keeping with the dichotomy preventing admission of such evidence when lacking in substantial similarity with the facts in litigation. Petitioner cites general language quoted by the *Hale* court to the effect that substantial similarity is required for experimental tests as authority for Petitioner's position that *Hale* refuses to recognize the dichotomy. In doing so, Petitioner is totally disregarding the context of the *Hale* opinion. The language relied upon by Petitioner, when read in context, is directed to experimental evidence of prior or reconstructed accidents and not to experimental evidence in general.

The Hale court made its recognition of the dichotomy between re-creation evidence and illustrative evidence perfectly clear when it decided the case of *Randall v. Warnaco, Inc., Hirsch-Wise Division*, 677 F.2d 1226, 1233-1234 (8th Cir., 1982). Petitioner concedes that *Randall* recognizes the dichotomy, but maintains that the Eighth Circuit reversed its position in deciding *Hale*. (Brief of Petitioner, p. 11). To the contrary, it is clear from a full reading of *Hale* that the case was decided on the facts and not on a new theory of admissibility. *Id.* at 1332-1333. In fact, not only does *Hale* not in any way overturn or criticize *Randall*, but the cases rely upon common authority for their decisions. *Hale*, 756 F.2d at 1333; *Randall*, 677 F.2d at 1233.

C. Only Petitioner Finds Conflict Among The Circuits.

Petitioner maintains there is conflict among the circuits as to this evidentiary question. Yet, in not one of the cases relied upon by either Petitioner or Respondent does a circuit court reject or even critize another circuit court opinion. It is only Petitioner who finds a conflict among circuits.

II. The Eleventh Circuit's Per Curiam Affirmance Without Opinion Does Not Conflict With Decisions Of Other Circuits.

The Eleventh Circuit Court of Appeals issued a per curiam affirmance without opinion of the trial court's judgment in the case *sub judice*. Thus, the court's reasons for affirming are not available. Even Petitioner admits "[t]he Eleventh Circuit has not articulated its rule" as to similarity requirements for out-of-court experiments. (Brief of Petitioner, P. 12).

The lack of a published opinion by the appellate court is particularly significant in light of the manner in which the trial court approached the question of admissibility of the out-of-court experiment. Petitioner would apparently have this Court believe the trial court refused to recognize similarity as a factor determining admissibility and that the Eleventh Circuit's affirmance effectively so held. To the contrary, as shown in detail in the Statement of the Case, *supra*, before ruling that the video film and test tire would be admitted, the trial judge viewed the video film in question and heard extensive voir dire of the experts concerning similarities and the relevance of dissimilarities between the out-of-court experiment and the facts in litigation. Thus, it is clear that the trial court did consider similarity in ruling on the admissibility of the out-of-court experiment. Yet Petitioner now maintains the effect of the appellate court's affirmance without opinion is to say that similarity is not an issue in determining admissibility.[6]

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[6] It is interesting to note Petitioner in her brief to the circuit court argued that the Eleventh Circuit requires similarity between out-of-

The per curiam affirmance without opinion by the Eleventh Circuit in this case does not decide whether similarity is required in the Eleventh Circuit since that issue was not enumerated on appeal from the trial court. (Petitioner's Brief to the Eleventh Circuit, p. 28). In a procedurally analogous case, *NLRB v. Sears, Roebuck & Company*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), this Court declined to consider an issue where the Court of Appeals had affirmed without opinion and it was not clear whether the Court of Appeals had passed on the issue. *Id.* 421 U.S. at 163-164, 44 L.Ed.2d at 54-55. *See also, Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312, 91 S.Ct. 658, 28 L.Ed.2d 64, 71-72 (1971).

As outlined in the Statement of the Case, *supra*, the evidence in issue in the case *sub judice* was admitted for purposes of illustrating the testimony of Respondent's expert. T. 253-254, 383, 385. The video tape simply showed the puncture of a truck tire by a foreign object and the run flat of that tire for a distance of 1,200 feet. The video tape did not in any way depict or portray any injury to person or property other than the tire itself. T. 384-385. The video and test tire depicted therein were offered to illustrate the testimony of the Respondent's expert that he had conducted numerous tests on the physical effects that blowouts have on tires. T. 382, 458, 495. Under these facts, the video and test tire were offered for illustrative purposes and the test for ad-

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court experiments and facts in litigation. (Petitioner's brief to Eleventh Circuit, P. 28). Where, as here, the issue presented to the Eleventh Circuit was whether the evidence met the test of similarity rather than whether similarity was required, it certainly cannot be said that a per curiam affirmance without opinion had the effect of abolishing the requirement of similarity. Yet, in an apparent attempt to "create" a conflict among circuits, Petitioner now argues that the Eleventh Circuit does not require similarity. (Brief of Petitioner, p. 9).

missibility was whether there was some similarity such as would make the evidence relevant. *Szeliga v. General Motors Corporation*, 728 F.2d 566, 567 (1st Cir., 1984). Prior to ruling on the admissibility of the video and test tire, the trial judge sent the jury out of the courtroom and viewed the video film and heard extensive voir dire examination of all three experts as to the similarities and differences between the test blowout and the blowout on decedent's truck. T. 384-402. Relying on the screening of the film and the voir dire testimony on the question of similarity, the trial court overruled Petitioner's lack of similarity objection and instructed that counsel for Petitioner could cross-examine on dissimilarities. T. 402-403. This decision was in complete keeping with *Szeliga, supra; Ramseyer v. General Motors Corporation*, 417 F.2d 859 (8th Cir., 1969); *Young v. Illinois Central Gulf RR Company*, 618 F.2d 332 (5th Cir., 1980); and all other decisions of the circuit courts on the admissibility of illustrative evidence.

III. Admissibility Of Out-Of-Court Experiments Is A Subject For The Broad Discretion Of Trial Courts.

Petitioner argues that Federal Rules of Evidence 401 and 402 (requiring relevancy) and Federal Rule of Evidence 403 (granting the trial court discretion to exclude evidence where the probative value is substantially outweighed by dangers of unfair prejudice, etc.) have received various and conflicting interpretations from the circuits regarding the admissibility of evidence of out-of-court experiments. (Brief of Petitioner, p. 10). In answer, Respondent first notes that the trial courts have broad discretion in ruling on relevance and admissibility of evidence. *Collins, by and through Kay v. Seaboard Coastline RR Company*, 675 F.2d 1185, 1196-97 (11th Cir., 1982); *United States v. 110 Bars of Silver, 3 Crucibles of Silver, 11 Bags of Silver Coins*, 508 F.2d 799

(5th Cir.), cert. denied sub nom. *Resnick v. United States*, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975).

As to the Rule 403 issue in particular, the Rule does not confer upon a party a right to exclude evidence. Instead, the Rule is a grant of discretion to the trial court. Wright & Graham, *Federal Practice and Procedure, Evidence*, § § 5212, 5224, pp. 251, 252, 319. As originally proposed, the Rule required exclusion of relevant evidence found to be substantially outweighed by the danger of unfair prejudice, but as finally enacted the Rule provided that the trial court "may" in its discretion exclude such evidence substantially outweighed by danger of unfair prejudice. 1 Weinstein & Berger, *Weinstein's Evidence*, § 403; *Dent v. Riddle*, 664 F.2d 1, 5 (1st Cir., 1981); *United States v. Long*, 574 F.2d 761, 767 (3rd Cir., 1978). Thus it is precisely when probative value is actually substantially outweighed by danger of unfair prejudice that the trial judge's discretion comes into play. Wright & Graham, *Federal Practice and Procedure, Evidence*, § 5214. And then, "the general rule is that the balance should be struck in favor of admission." *United States v. Day*, 591 F.2d 861, 878 (D.C. Cir., 1978). *See also*, Graham, *Handbook of Federal Evidence*, 1984 pocket part, § 403.1, n. 8.5, pp. 38-39.

As an exercise of discretion, a trial judge's ruling under Rule 403 may be reversed only if there was a clear abuse of discretion. *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir., 1981); *United States v. Adcock*, 651 F.2d 338, 343 (5th Cir., 1981); *United States v. Blevinal*, 607 F.2d 1124, 1128 (5th Cir., 1979); *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir., 1979). *See also, United States v. Robinson*,560 F.2d 507 (2nd Cir., 1977) (affirm unless trial judge acts "arbitrarily and irrationally").

As for the admissibility of out-of-court experiments in particular, that determination is one for the sound and broad discretion of the trial courts. *Szeliga v. General Motors Corporation*, 728 F.2d 566, 567 (1st Cir., 1984); *Millers' National Insurance Company, Chicago, Illinois v. Witchita Flour Mills Company*, 257 F.2d 93, 99 (10th Cir., 1958); *Johnson v. William C. Ellis & Sons Iron Works*, 604 F.2d 950, 958 (5th Cir., 1979). "Each case must be judged under its own particular facts taking into account the specific purposes for which this type of evidence is submitted."*Robbins v. Whelan*, 653 F.2d 47, 49-50 (1st Cir.) cert. denied, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981); *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir., 1984). In arguing that a conflict among circuits exists, Petitioner fails to note the particular facts on which the cases upon which she relies were decided. Rather, Petitioner generalizes the holdings of those cases in seeking to discover a conflict among circuits.

CONCLUSION

There is no conflict among the United States Circuit Courts of Appeal on the requirements of similarity in admitting evidence of out-of-court experiments. While the similarity requirement does vary with the nature of the out-of-court experiment sought to be admitted, the circuit courts are uniform in recognizing this.

It would be an overwhelming task for the United States Supreme Court to attempt to review *discretionary* evidentiary matters in the district courts of this country. The petition should be denied and this litigation brought to an end.

Respectfully submitted,

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